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No. _____

In The

Supreme Court of the United States

GABRIEL TORRES, NONI ONOSSIAN, CYRIL ONOSSIAN, and HERVE ONOSSIAN,

Petitioners,

v.

H. BONILLA, S. M. SHENIAN, SHERMAN BLOCK, COUNTY OF LOS ANGELES, DANIEL FINN, and BRUCE THOMAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's opinion in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed. 2d 1043 (1998), apply to wholly innocent bystanders who are injured as a result of police vehicle pursuits?

2. In police vehicle pursuit cases, does a due process, "no process," violation lie under 42 U.S.C. § 1983 against state officers when a state, here California, affords no process at all, by having enacted an immunity statute that bars all redress for injuries suffered by innocent bystanders who are harmed by a police pursuit?

3. Is it proper to grant judgment as a matter of law to police pursuit defendants in an action under 42 U.S.C. § 1983 when the facts show those defendants had time actually to deliberate their actions or actually did deliberate their actions?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PETITION FOR WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT 3

A. The facts of the *Torres* case..... 3

B. The facts of the *Onossian* case 8

REASONS FOR GRANTING THE PETITION 14

INTRODUCTION..... 15

A

THIS COURT'S DISPOSITION OF *LEWIS* DOES NOT, NOR SHOULD IT, APPLY TO INNOCENT BYSTANDERS TO POLICE PURSUITS 17

B

WHEN A STATE PROVIDES NO PROCESS AT ALL TO REDRESS STATE ACTION, THERE IS A "NO PROCESS" DUE PROCESS VIOLATION THAT IS COGNIZABLE UNDER SECTION 1983 20

C

THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT AND THE TENTH CIRCUIT ON THE ISSUE OF WHETHER THIS COURT'S SHOCK THE CONSCIENCE STANDARD IS TO BE APPLIED IN CASES IN WHICH POLICE HAVE HAD AN OPPORTUNITY TO DELIBERATE..... 25

TABLE OF CONTENTS – Continued

Page

D

THE FACTS OF PETITIONERS' CASES SHOW BOTH DELIBERATE INDIFFERENCE AND CONDUCT THAT SHOCKS THE CONSCIENCE, AND THEREFORE, THEIR CASES SHOULD NOT HAVE BEEN DECIDED AS MATTERS OF LAW, BUT SHOULD HAVE GONE TO A JURY 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994)..20, 21, 22, 23, 24

City of Los Angeles v. Heller, 475 U.S. 796 (1986)..... 30

City of Monterey v. Del Monte Dunes, 119 S.Ct. 1624 (1999).....20, 21

Heck v. Humphrey, 512 U.S. 477 (1994)..... 21

Ingraham v. Wright, 430 U.S. 651 (1977).....20, 22

Monell v. Dept. of Soc. Svcs. of the City of New York, 436 U.S. 658 (1978)..... 30

Onossian v. Block, 175 F.3d 1169 (9th Cir. May 26, 1999)..... *passim*

Radecki v. Barela, 146 F.3d 1227 (10th Cir. 1998)...26, 27

Torres v. Bonilla, 1999 WL 362974 (9th Cir. May 28, 1999)..... *passim*

CONSTITUTION

Fourth Amendment..... 1

Seventh Amendment..... 27

Fourteenth Amendment.....1, 14, 23

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983.....2, 3, 14, 20, 23

TABLE OF AUTHORITIES – Continued

Page

CALIFORNIA VEHCILE CODE

§ 17001 ..... 2, 24

§ 17004 ..... 2, 25

§ 17004.7(b) 3, 25

OTHER AUTHORITIES

Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 2d § 17.4, pp. 624-26 (1994) 22

PETITION FOR WRIT OF CERTIORARI

Gabriel Torres, Noni Onossian, Cyril Onossian, and Herve Onossian,[1] in their two separate cases, jointly petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The dispositions of the Court of Appeals are to be located at 1999 WL 362974 (9th Cir. May 28, 1999) (*Torres v. Bonilla*), and 175 F.3d 1169 (9th Cir. May 26, 1999) (*Onossian v. Block*), which are set forth, respectively, at Appendix 1 and Appendix 2 hereto.

JURISDICTION

The judgments of the Court of Appeals were entered, respectively, on May 26, 1999 (*Onossian*) and May 28, 1999 (*Torres*), and this Court's jurisdiction timely is invoked pursuant to 28 U.S.C. § 1254(1), because this Joint Petition is filed on August 24, 1999, within 90 days of those dispositions.

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[1] All petitioners herein filed a joint *amici curiae* brief in *County of Sacramento*, 523 U.S. 833, 118 S.Ct. 1708 (1998), *see id.* at 118 S.Ct. 1708, 1715 n. 6; 1999 WL 615861, in which they argued only that police pursuit cases properly should be analyzed legally under a Fourth Amendment, rather than under a Fourteenth Amendment, standard.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Sec. 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

California Vehicle Code

§ 17001. "A public entity . . . [is] liabl[e] for . . . injury to person . . . proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment."

§ 17004. "A public employee . . . [is immune from] civil damages on account of personal injury . . . of any person . . . resulting from the operation, in the line of duty, of an authorized emergency vehicle while . . . in the immediate pursuit of an actual or suspected violator of the law . . . ."

§ 17004.7. "(b) A public agency employing peace officers which adopts a written policy on vehicular pursuits [whether or not any such policy is complied with during any given pursuit] . . . [is immune] from liability for civil damages for pesonal injury . . . of any person . . . resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued by a peace officer employed by the public entity in a motor vehicle."

STATEMENT

Petitioners, all of whom were innocent third parties who were injured very seriously as the result of police vehicle pursuits of others, sued California Highway Patrol officers (Torres) and Los Angeles County Sheriff's deputies (the Onossians) for redress under 42 U.S.C. § 1983 in the United States District Court for the Central District of California.

In both cases, law enforcement officers engaged in high-speed car chases of suspects, and the facts of each case are set forth here.

A. The facts of the *Torres* case

On May 12, 1994, at approximately 3:30 A.M., petitioner Gabriel Torres, aged 23 at the time, who worked night shift fixing the San Diego, 405 Freeway in Simi Valley, California, was driving home from work on the Hollywood/Ventura, 101 Freeway south, when his vehicle was struck by a vehicle pursued by respondents California Highway Patrol officers Bonilla and Shenian, who

had engaged it in a high speed chase. The vehicle being pursued by respondents had accelerated to speeds as high as 130 miles per hour, and it collided with the rear of petitioner's vehicle with such force that petitioner was horribly injured and disfigured: he no longer has a nose. In addition to being blinded in his left eye, plaintiff is now forced to wear a prosthetic device in his eye; his left eye is painful, and causes him to tire easily, and sometimes it bleeds or becomes infected. The bone structure of his nose is irreparably shattered, and he has lost his sense of smell, and will require several more reconstructive surgeries over the course of his lifetime. The bones on the left side of plaintiff's face were shattered, causing loss of sensation to that side of his face, and the surgical insertion of plates. As a result of the insertion of the plates, a prominent surgical scar now crosses the top of his head from one ear to the other. Petitioner's jaw was broken, and he received stitches to his gums, because his teeth came so loose from the force of the impact. The plates in the left side of petitioner's face, make him feel as if "something is pulling something inside." The scar on petitioner's head shows even when he grows his hair long. Petitioner no longer remembers things the way he did before the incident, and his work as a carpenter is much harder because now, half-blind, he bumps into things, and has difficulty concentrating when he works on two story buildings. Petitioner no longer socializes with his old friends because of his changed appearance, and even his relationship with his family has been affected by his injuries. In short, petitioner is irreparably and permanently, grievously injured as a result of the high speed chase indulged in by respondents.

When respondent Shenian first saw the suspect's vehicle, respondent Shenian and his partner, respondent Bonilla, were 150 to 200 yards west of the 405 Freeway, traveling eastbound. Shenian was driving, and when he first observed the suspect's vehicle, it was traveling at approximately 45 miles an hour, and it was straddling the two lanes closest to the shoulder side of the freeway, the 101 Freeway having four lanes at that place. In his deposition, respondent Shenian refused to describe the suspect driver's actions as "weaving," yet Shenian admitted that the suspect driver "drifted back within the lane and then straddled, I believe, twice." Shenian believed the suspect driver to be under the influence of alcohol or drugs, and conceded that a person driving under the influence of alcohol or drugs might have an impaired ability to drive, as well as impaired perception and judgment, that would result in his or her being a danger to other people on the highway, and in some instances would cause "death or serious illness." Respondent Shenian admitted that, at the time respondents initiated the pursuit, the suspect vehicle was driving *at a safe speed* at that time for that vehicle, even though it was "drifting."

Upon observing the apparently intoxicated motorist, respondents thereupon activated their red lights and siren, and, when the apparently intoxicated motorist in response greatly accelerated his speed from 45 miles per hour to over 100 miles per hour, respondents decided to chase the suspect, and thereupon engaged in a chase of the suspect's vehicle, during which respondents drove at speeds as high as 120 miles per hour, and the apparently intoxicated motorist stayed ahead of them. Speeds once the pursuit started always exceeded "over 100 miles an hour." Defendants pursued the apparently intoxicated

driver with a distance between their vehicles of approximately only 25 yards. While respondent Shenian gave some consideration to the safety of other motorists to the extent that he took steps to avoid crashing into other vehicles *himself*, he was unable to recall that he gave any consideration to the safety of motorists who might be ahead of the fleeing, apparently intoxicated motorist.

According to the radio log of the pursuit, respondents first radioed their position at 3:12 A.M., and by then they already were approaching the Laurel Canyon exit from the freeway at 120 miles per hour, and this was several miles from where they had first sighted the defendant. One minute later, at 3:13 A.M., respondents radioed that they had lost sight of the apparently intoxicated motorist, who by that time was traveling at 130 miles per hour, and who continued to travel at 130 miles per hour while passing the Highland Avenue exit from the freeway. At Vine Street, at 3:16 P.M., the suspect crashed his vehicle into the rear of petitioner's vehicle, got out, and ran away. Respondents conceded in their Opening Brief on appeal that the high speed pursuit lasted at least six to seven minutes, and covered about 9.6 miles.

According to a statement given by respondent Shenian, the suspect motorist was "weaving within the #3 lane," prior to approaching Sepulveda Boulevard on the eastbound U.S. 101 freeway. After the chase commenced, respondents pursued the suspect along the 101 freeway eastbound, then along the U.S. 101/SR 134 transition road, with the suspect motorist traveling at a speed of "(120)+ MPH," and then to the southbound U.S. 101. Respondent Shenian saw the suspect vehicle, now on the Hollywood Freeway, approaching Lankershim Boulevard traveling at 130 miles per hour. At Cahuenga Boulevard,

defendants had "slowed down for the left turn in the roadway," and at that point came upon the collision wreckage of the crash between their suspect's vehicle and petitioner's car, noting that in petitioner's vehicle, "there was a solo driver trapped inside."

Thus, respondents pursued a motorist whom they believed was intoxicated, for nearly 10 miles, at grotesquely high speeds, prior to his collision with petitioner.

When respondent Bonilla, the passenger in respondent Shenian's patrol cruiser, first observed the motorist whom they subsequently pursued, he believed the motorist was a "DUI suspect." Bonilla based his opinion on the fact the motorist was "straddling the No. 3 lane into the No. 4 lane approximately three or four feet on two occasions. Then he was jerking, there was a jerking motion to the vehicle . . . [and] [t]he slowness of the vehicle." Bonilla opined that "a person driving under the influence of drugs and alcohol is dangerous to the public safety because of impaired judgment, perception and reaction time." Bonilla conceded that the faster a DUI suspect drove, the more of a danger such a person posed to the public safety. Bonilla maintained that the apparently intoxicated motorist was driving between 120 and 130 miles per hour, while the respondents' cruiser was traveling between 100 and 105 miles per hour, and that during the course of the pursuit they passed "probably 20 to 30 vehicles." Bonilla thought it was possible that the suspect vehicle might rear-end another vehicle ahead of it (he actually deliberated), but decided (after deliberating) that the respondents' only responsibility was that "*we* weren't going to crash into anybody." (Emphasis added).

This conduct is, *per se*, both deliberately indifferent and shocking to the conscience because of the lack of seriousness of the offense for which they pursued the fleeing vehicle, the fact that respondents, themselves, caused the vehicle they pursued to accelerate its speed, the high speeds at which respondents continued to travel over a long stretch of freeway and over nearly ten minutes' time, and the fact that they had sufficient time to deliberate and in fact did deliberate their actions.

B. The facts of the *Onossian* case

On the evening of August 17, 1991, a speeding motorist passed by respondent Los Angeles County Sheriff's deputies, respondents Daniel Finn and Larry Yates in a hardtop Oldsmobile "muscle car," while weaving in and out of traffic and traveling at about 60 miles per hour on a busy and crowded Santa Monica Boulevard in the West Hollywood area of Los Angeles County. Respondents took up a pursuit of the speeding motorist, and the motorist continued to drive both erratically and recklessly. Respondent Finn, who was driving the police cruiser, activated its siren and overhead lights, and continued the pursuit. The fleeing motorist sped up, apparently attempting to get away from respondents', got up to speeds of 70 miles per hour.

Respondent deputy sheriff Bruce Thomas was monitoring the high-speed chase on his cruiser radio and observed the fleeing Oldsmobile run through a red light without stopping, at the intersection of Santa Monica Boulevard and Melrose Avenue.

The Oldsmobile had been going so fast that respondents Finn and Yates became unable to keep up with it in the congested traffic, and respondent Thomas took up the

chase. The Oldsmobile then crashed into the petitioner Onossians' vehicle. The pursuit lasted about a minute, the respondents' vehicles' speeds did not exceed 45 miles per hour, and the closest distance between either respondents' cruisers and the Oldsmobile was 100 yards.

All three deputies had time to and did, in fact, deliberate their actions, and their conduct shocks the conscience, given the very congested traffic conditions where the chase occurred, the fact that they got the suspect's license plate number, the lack of seriousness of the offense based on which they pursued the Oldsmobile, and the speeds at which the pursued vehicle was traveling.

All three petitioners were very severely and permanently injured.

Respondent deputy sheriff Daniel Finn drove the first police pursuit vehicle, and testified as follows:

> Were you pursuing a dangerous felon? No.
> [W]hat were the speeds at which the person being pursued was traveling? 70 miles an hour.
> Was the person being pursued ever driving recklessly? Yes.
> Was the person being pursued ever a public danger? Yes.
> . . . [H]e was exceeding the posted speed limit of 35 miles per hour; . . . he ran one, two, three red lights;
> . . . he made two right-hand turns from a left turn lane
> . . . ; he was weaving in and out of traffic lanes. . . .
> Was everything you did during the pursuit within policy? Yes.
> Was anything you did during the pursuit not within policy? No.

With respect to the pursuit . . . did you make the decision you yourself, as opposed to any other person, that the pursuit did not outweigh the safety of the public? Yes.

. . . .

[T]raffic was medium to heavy.

. . . .

Would you agree that the narrow streets . . . were streets on which a pedestrian crossing a street could be encountered? Yes.

. . . .

At the time you conducted this high-speed pursuit, were you under the belief that you were immune from any civil liability based on California law? Yes.

. . . .

How would you describe his [the driver of the pursued vehicle] driving prior to his turning onto Larrabee Street? Reckless.

. . . .

At the time that you turned onto Larrabee Street, had you activated your siren or red lights? No.

. . . .

Did it appear to you . . . that he was trying to evade you? Yes, it appeared that way.

. . . .

Was the idea to carry out the pursuit entirely yours? Yes.

Was your idea of continuing the pursuit to the point you continued it entirely yours? Yes.

. . . .

[As to defendant Thomas] I believe he said, "I've got the vehicle eastbound on Melrose. . . .

At that time, . . . at what speed was the suspect vehicle traveling? My estimation at that time was 60 to 70 miles per hour.

What was the posted speed limit at Melrose Avenue and Robertson? I believe it was a 35 zone. . . . It could have been 30 I guess. . . .

. . . .

Were you not concerned that by initiating a pursuit, the suspect's vehicle might be driven even more recklessly and even faster? The possibility exists.

. . . .

And at no time prior to the actual crash itself did you formally abandon the pursuit; correct? That's correct.

. . . Did you observe the suspect to be driving recklessly . . . ? Yes. . . .

[D]id you observe the suspect [again] to be traveling in a reckless way? Yes.

. . . .

[H]is reckless manner of driving a vehicle of that type, an Olds – I believe it was a GTO 442 which is a kind of classic muscle car . . . on medium to heavily traversed streets; [when] most people . . . don't drive them in the manner he was driving. . . . [Quotes inverted.]

. . . .

[Y]ou bore operational responsibility for the pursuit, correct? Yes.

. . . .

[Y]ou bear operational responsibility for the pursuit including that of Deputy Thomas? Yes. Were you aware that the policy suggested that when surface street speeds approached 60 miles per hour, that consideration should be given to abandoning a pursuit? Yes.

. . . .

Did you consider the suspect to be a dangerous driver? Yes[,] . . . [because of] his driving pattern of speed, failure to stop for red lights, right

turns from center lanes, weaving in and out of traffic.

. . . .

Deputy Yates was respondent Finn's passenger in the first pursuit vehicle, and her testimony was:

[Was it] a high-speed pursuit? Yes.

. . . .

Was the person being pursued a dangerous felon? No, not a dangerous felon. Was the person being pursued ever driving recklessly? Yes, the entire time.

Was the person being pursued ever a danger to the public? At all times. He was weaving in and out of traffic, dodging around cars, traveling very, very fast for that time of day and the traffic conditions, well over the speed limit.

. . . .

[W]as everything you did during the pursuit within policy? Yes.

Was anything that you did during the pursuit not within policy? No.

. . . .

[We pursued him f]or speeding, for reckless driving[ ] [and traffic conditions were m]edium to heavy. . . . [Heavy traffic is w]here there's stop and go traffic, numerous – numerous stops, very small gaps between cars.

. . . .

[The posted speed limit was] either 30 or 35 miles per hour.

. . . .

[His driving] was reckless. . . . With so many cars on the road, the other drivers are not prepared for somebody to make a turn from a left lane over onto another street, he could have easily caused a collision.

. . . .

Did you accelerate once you were on Larrabee? Yes.

. . . .

He was driving extremely reckless, but he was making quick movements. . . .

. . . .

He was going very fast. It could have been 65.

. . . .

How did you expect to catch up with the person if he was going at that rate of speed . . . if you were traveling at 45 and he was traveling at 60, 65 miles per hour?

We did not know. . . .

[Question: Were the police really going only 45?]

. . . .

There is a lot of pedestrian traffic in West Hollywood, and there is always a possibility that somebody is crossing a street, getting into a car. It's very narrow. Those streets are very narrow. Somebody could have been getting out of their vehicle.

. . . .

Did you consider that the suspect was traveling at a dangerously high rate of speed given the fact that he was traveling on city streets? Yes.

Was that correct during the entire length of the pursuit? Yes.

. . . .

When we felt he was going over 60, between 60 and 70 miles per hour, we were just about to abandon the pursuit when Deputy Thomas jumped in.

. . . .

[D]id you ever attempt to abandon the pursuit [on Santa Monica Boulevard]? . . . No.

Respondent deputy Bruce Thomas claims he had nothing to do with the pursuit, and testified:

> From the point in time the pursuit began to the time the pursuit ended in this case with respect to your participation in it, how much time passed? Ten to – ten to 15 seconds maybe . . . . There is no time that I am in pursuit. . . . What speeds were you traveling during the pursuit? I have to say zero, then eventually maybe 35 to 40, maybe, 35 to 40, I guess. . . . I say on the radio, "I've got him" . . .
>
> . . . .
>
> Did the suspect vehicle go by you? Eventually, yes.

The above admissions show that there was both deliberation and deliberate indifference, as well as conduct that accurately could be found to be conscience-shocking.

REASONS FOR GRANTING THE PETITION

1. Wholly innocent citizens, as opposed to suspects in crimes, should not be left with no remedy at all when they are injured by suspects who flee from police.

2. This Court's "shocks the conscience" standard of culpability should not be applied to non-suspects who are innocent victims in police pursuit cases.

3. When a state effectively has foreclosed any process by which a victim of police action may recover damages, such a victim should have a right to assert a due process, "no process," claim for violation of her or his Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983.

4. The proper standard of culpability to be applied in police pursuit cases when there is, in fact, time within which police can deliberate their actions, is not "shocks the conscience," but rather "deliberate indifference." Since the facts of petitioners' separate cases provide bases on which a reasonable jury could make a finding of "deliberately indifferent" conduct, it was error for judgment as matter of law to be rendered against petitioners.

5. There is a conflict between the Ninth Circuit and the Tenth Circuit Courts of Appeals on the issue of whether *Lewis'* shocks the conscience standard is to be applied in cases in which police who have an opportunity to deliberate their actions in pursuits is to be applied.

6. Public officers have used methods that are alien to our Constitution, and they will be permitted to escape the consequences of their bad conduct unless certiorari is granted.

7. The dispositions below are at odds with the Constitution and with this Court's prior holding that, in police pursuit cases in which there is time to deliberate, the standard of culpability is to be "deliberate indifference."

8. The issue presented will affect numerous federal civil rights cases in a way that very negatively affects wholly innocent citizens.

INTRODUCTION

California police pursuits have left a deplorable wake of devastation of innocent bystanders. *See Not Just Isolated Incidents: The Epidemic of Police Pursuits in Southern California*, June, 1996, Separate Appendix to Petition for Writ of Certiorari.

In this wake each of the joint petitioners' cases, wholly innocent motorists were severely injured, disfigured, and permanently damaged as the direct result of California law enforcement officers' vehicle pursuits of suspects who had committed relatively minor traffic infractions.

In each case, a vehicle infraction suspect who was pursued by police crashed into an innocent third party's vehicle. In the *Torres* case, the crash into the rear of an unsuspecting motorist was by a man who was chased by California Highway Patrol officers, who chased the man for weaving in his lane on an uncrowded freeway at about 3:00 A.M., and occurred after a nearly 10-minute pursuit that reached speeds up to 130 miles per hour. In the *Onossian* case, the head-on crash into petitioners' vehicle occurred on a crowded West Hollywood street at about 5:00 P.M., and was the culmination of a shorter chase that reached speeds of up to 70 miles per hour. In both cases, the police had time to deliberate their actions, the police in fact did deliberate their actions, the police knew their actions were extremely dangerous to both motorists, and in the *Onossian* case also to pedestrians, and yet, indeed because they knew they would be immune for any bad consequences of their actions, continued the pursuits.

In California, at least since 1987, because of an ill-conceived and pernicious immunity statute that is the result of bad government-interest-but-anti-public lobbying, both police, and the governments for whom they work, who cause innocent persons to be injured as the result of police pursuits may not, as a matter of law, be held liable for the harm they cause. Thus, there is no available process in California for innocent bystanders

who are harmed as the result of police pursuits to seek recompense for that harm.

This Court resolved this legal situation in *Lewis, supra* at i, but only as to suspects who were pursued by police and not as to innocent bystanders, and the Court specifically did not address the issue that arises when a state, like California, provides no tort remedy to a victim of government misconduct. Moreover, the Court held that the standard of culpability it set for police vehicle pursuits, "shocks the conscience," applied only when police either had no opportunity to deliberate their actions or did not actually deliberate their actions.

This Petition raises the issues of (1) the standard of culpability to be applied in cases in which innocent bystanders sue police for harm caused by vehicle pursuits, (2) whether there is a violation of due process when state law immunity effectively blocks state process to redress a tort, and (3) whether, in cases in which deliberation could have or did occur, the issue of liability may be decided as a matter of law by application of the "shocks the conscience" standard of culpability.

In these cases, at minimum, the issue of whether or not the challenged conduct shocked the conscience was a jury issue.

A

THIS COURT'S DISPOSITION OF *LEWIS* DOES NOT, NOR SHOULD IT, APPLY TO INNOCENT BYSTANDERS TO POLICE PURSUITS.

This Court granted certiorari in *Lewis* "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." 118

S.Ct. at 1713 (listing of conflicting circuits omitted; circuit cases involved conflict over standard of culpability as to "suspects" who were pursued).

The Court did not set the standard of culpability as to innocent bystanders in pursuits, and different policy considerations counsel that the standard of culpability in innocent bystander cases should be a lower standard than in suspect cases.

The reasons for this are that a suspect who flees from the police deserves less consideration from the law than does an innocent bystander, and, correlatively, a police officer who pursues a suspect who flees deserves more consideration from the law than does a police officer who continues a vehicle pursuit that endangers innocent bystanders. On the relative scale of culpability, (1) innocent bystanders deserve much legal consideration, and (2) police who, allegedly acting in the general public interest but who knowingly violate the interests of the public at large in an end justifies the means calculus, deserve little consideration from the law. This is especially so when, as here, the police know they are absolutely immune from suit if they harm an innocent bystander.

Indeed, as this Court stated in *Lewis*, "[t]he touchstone of due process is protection of the individual against arbitrary action of government[,]" *id.* at 1716 (quotation marks and citation omitted), and police who engage in conduct without regard for harm that may be caused to innocent bystanders, and because they know they will be immune from damages for such harm, truly violate due process protection because they engage in quintessentially prohibited arbitrary action.

In holding that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983[,]" *id.* at 1720, this Court did not address the redressibility under section 1983 of Fourteenth Amemdment claims by innocent bystanders who are injured in high-speed police chases, and petitioners request the Court to grant certiorari to address this important issue. No legitimate public policy of legal reason exists to place innocent bystanders who are harmed by police pursuits in the same category as suspects who are pursued or who flee during pursuits.

A significant reason to make this distinction is that, unlike as in *Lewis*, 118 S.Ct. at 1721, where the police "had done nothing to cause . . . [the] high-speed driving in the first place, nothing to excuse [the fleeing suspect's] flouting of the commonly understood law enforcement authority to control traffic, and nothing . . . to encourage [the fleeing suspect] to race through traffic at breakneck speed[,] . . . [while the suspect's own] outrageous behavior was practically instantaneous, and so was [the police officer's] instinctive response[,]" *ibid.*, here the police, themselves (in *Torres*) caused the high-speed driving in the first place, petitioners did nothing that would need to be excused and did not flout, much less break, the law, and in both cases the police caused and encouraged the fleeing suspects – not petitioners – to race at (relatively in the *Onossian* case) and absolutely (in the *Torres* case) break-neck speeds. Here, the victims engaged in no bad conduct, and the pursuing officers did not act instantaneously, but acted with deliberation. *See* facts, *supra*. There was both an opportunity to deliberate and actual deliberation.

It would be unfair, and therefore unjust, to force into a procrustean bed with lawbreakers who knowingly flee from police, "flouting [the] commonly understood law enforcement authority to control traffic," *ibid.*, innocent bystanders who are harmed by those very automotive projectiles who justly got scant consideration from this Court when it settled upon the "shocks the conscience" standard of culpability for wrongdoers who themselves sue under section 1983.

Innocent bystanders who are injured by police pursuits should be entitled to more consideration from this Court than it gave to wrongdoers who run from police.

B

WHEN A STATE PROVIDES NO PROCESS AT ALL TO REDRESS STATE ACTION, THERE IS A "NO PROCESS" DUE PROCESS VIOLATION THAT IS COGNIZABLE UNDER SECTION 1983.

This Court's "precedents make clear that a state actor's random and unauthorized deprivation of . . . [a Due Process] interest cannot be challenged under 42 U.S.C. § 1983 *so long as the State provides an adequate postdeprivation remedy.*" *Albright v. Oliver*, 510 U.S. 266, 284 (1994) (plurality) (Kennedy and Thomas, JJ., concurring in judgment; emphasis added; citations omitted). *See also, Ingraham v. Wright*, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting; "adequate state remedy . . . may satisfy the due process requirement when a State has impaired an individual's interest in reputation"). *Cf. City of Monterey v. Del Monte Dunes*, 119 S.Ct. 1624, 1639 (1999) ("Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the

taking alone.") By sound logical extension, when a state actor's deprivation of a due process interest *cannot be redressed by state provision of any remedy at all,* here because the postdeprivation remedy has been blocked by a state immunity statute, perforce a state's action must be redressible under section 1983, notwithstanding that "some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer[,]" *Albright,* 510 U.S. at 284, if only because, indeed because, that state will have determined that there is to be no process at all, much less due process. This Court's recognition that it "ha[s] repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability[,]" *Heck v. Humphrey,* 512 U.S. 477, 483 (1994) (quoting *Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 305 [1986]), and that "[j]ust as common-law tort actions provide redress for interference with protected personal and property interests, § 1983 provides relief for invasions of rights protected under federal law[,]" *City of Monterey,* 119 S.Ct. at 1638, will rest as dead letters unless this Court gives vitality to its promise of a remedy under section 1983 in instances in which there is no state law remedy.

As well-respected commentators have put it in an analogous situation:

> The ruling [in *Paul v. Davis,* 424 U.S. 693 (1974)] that mere injury to reputation does not constitute a deprivation of liberty thus may mean only that the injured person must be satisfied with a [state] tort remedy. . . . If the State had no tort action . . . against such officials – if the State granted its public officials immunity . . . while otherwise recognizing [such an] action – it

> would raise a much more serious question as to whether the State was depriving someone of liberty . . . by allowing government to damage hi[m] . . . with no hope of rectifying the harm done.
>
> * * *
>
> [T]he government's ability to regulate or eliminate an area of activity for a general class does not mean that it should be able to single out individuals for special limitations of freedom of action without granting them some process to determine the basis for such an action . . . . [W]hen the state acts against a specific individual, it must do so in a procedurally fair manner.

Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 2d § 17.4, pp. 624-26 (1994) (citing *Ingraham v. Wright*, 430 U.S. 651, 701 [1977] [Stevens, J., dissenting] as partial authority for first paragraph quoted).

This does not disturb what this Court has described as due "respect[ ] [for] the delicate balance between state and federal courts and comports with the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by the common law and the laws of States, as well as by the Constitution[,]" *Albright*, 510 U.S. at 284, because here the State of California has made nugatory any tradition to protect the rights of its inhabitants who may be injured by its pursuing police, and has "no protection for persons and their rights . . . afforded by [its] common law" because it took away those rights by enacting a scheme of immunity statutes, leaving persons who are harmed as a result of its police chasing suspects with no remedy but under section 1983. It is because of this, and also because

of "the important role federal courts have assumed in elaborating vital constitutional guarantees against arbitrary or oppressive state action[ ] [that this Court has] want[ed] to leave an avenue open for recourse where we think the federal power ought to be vindicated." *Id.* at 285 (citation omitted). Here, California has chosen to abrogate the process it had until 1987 when it immunized all police chase wrongdoing, *see infra*, and thereby it violated due process of law by doing away with due process of law.

There is "no basis for intervention under § 1983, at least in a suit based on the Due Process Clause of the Fourteenth Amendment simpliciter[,]" *ibid.*, but only when an injury "can be remedied by state law. . . . " *Ibid.* In *Albright*, Justices Kennedy and Thomas held in concurrence that since "Illinois provides a tort remedy for malicious prosecution[,]" *ibid.*, therefore, no section 1983 remedy was available, because "[g]iven the state remedy . . . there is neither need nor legitimacy to invoke § 1983 in this case." *Id.* at 285-86 (citation omitted). Here, on the other hand, since the injuries may *not* be redressed under California law, because California law provides blanket immunity for all wrongful conduct that bars the pursuit any state remedy, *see infra* at pp. 24-25, there is both *need and legitimacy* to invoke section 1983 in these cases.

"That said, if a State did *not* [as here] provide a tort remedy . . . there would be force to the argument that the [due process violation complained of in a section 1983 action] infringes an interest protected by the Due Process Clause and enforceable under § 1983." *Id.* at 286. Because California has foreclosed any tort remedy for injuries suffered by innocent victims of police pursuits there is much force to petitioners' argument that their liberty

interest protected by the Due Process Clause should be enforceable under section 1983, and this Court should so rule, because in *Albright* "given the state tort remedy, [this Court did not] need . . . [to] conduct that inquiry[,]" *ibid.*, and in fact did not conduct this inquiry.

Neither did this Court conduct this inquiry in *Lewis*, because it found that "Respondents do not argue that they were denied due process of law by virtue of the fact that California's post-deprivation procedures and rules of immunity have effectively denied them an adequate opportunity to seek compensation for the state-occasioned deprivation of their son's life. We express no opinion hereon the merits of such a claim[,]" [citing *Albright v. Oliver*] or on the adequacy of California's post-deprivation compensation scheme." 118 S.Ct. at 1714 n. 4. Indeed, California, rather than "guarante[eing] more than fair process [pursuant to the Due Process Clause]," as is required by this Court's "prior cases," *id.* at 1713 (internal quotation marks omitted; quoting *Washington v. Glucksberg*, 521 U.S. 702, ___, 117 S.Ct. 2258, 2267 [1997]; quotation inverted), has made sure there is no process at all.

The inquiry, therefore, and in light of petitioners' individual and collective, catastrophic injuries, should be conducted in these cases.

California Vehicle Code section 17001 provides for "public entity . . . liabl[ity] for . . . injury to person . . . proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." Section 17004.7 then immunizes from that liability "[a] public agency employing peace officers which adopts a written policy on vehicular pursuits [whether or not any such policy is complied with during

any given pursuit] . . . from liability for civil damages for personal injury . . . of any person . . . resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued by a peace officer employed by the public entity in a motor vehicle." Section 17004 goes on to immunize from that liability "[a] public employee . . . for civil damages on account of personal injury . . . of any person . . . resulting from the operation, in the line of duty, of an authorized emergency vehicle while . . . in the immediate pursuit of an actual or suspected violator of the law. . . . "

Every California police agency has adopted a chase policy as defined in Section 17004.7(b), and therefore, there is no available remedy under California law for any person injured as a result of a police pursuit. It follows, therefore, that California denies any remedy at all to innocent victims of police vehicle pursuits.

C

THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT AND THE TENTH CIRCUIT ON THE ISSUE OF WHETHER THIS COURT'S SHOCK THE CONSCIENCE STANDARD IS TO BE APPLIED IN CASES IN WHICH POLICE HAVE HAD AN OPPORTUNITY TO DELIBERATE.

In these cases, the Ninth Circuit had before it facts from which a reasonable jury could have found that respondents had an opportunity to deliberate their pursuit actions, and yet it blindly applied the *Lewis* shocks the conscience standard of culpability, disregarding the facts on which a finding of deliberation could be made.

In *Radecki v. Barela*, 146 F.3d 1227, 1231 (10th Cir. 1998), the court held that "*Lewis* directs us to analyze the level of culpability by examining the circumstances that surround the conduct at issue and the governmental interest at stake[,]" thus recognizing that application of the culpability standard requires a fact-specific, case-specific inquiry. The court further held that "*Lewis* points our inquiry to the official's opportunity for deliberation . . . [because w]e are directed to employ the 'deliberate indifference' standard only when actual deliberation is practical[ ] . . . [because] in assessing the constitutionality of law enforcement actions, we now distinguish between emergency action and actions taken after opportunity for reflection." *Ibid.* Here, there is abundant evidence of both opportunity for reflection and actual deliberation, and yet the Ninth Circuit, in conflict with the Tenth Circuit, still applied the shocks the conscience standard. Interpreting *Lewis* properly, the Tenth Circuit concluded that "[w]here the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience." *Id.* at 1232. While casting the culpability standard as shocks the conscience, the Tenth Circuit applied *Lewis* correctly by finding that a calculated indifference may be found when there is an opportunity to deliberate that, as here, was ignored.

This Court should grant certiorari in order to resolve this circuit conflict and to properly clarify its culpability standard.

D

THE FACTS OF PETITIONERS' CASES SHOW BOTH DELIBERATE INDIFFERENCE AND CONDUCT THAT SHOCKS THE CONSCIENCE, AND THEREFORE, THEIR CASES SHOULD NOT HAVE BEEN DECIDED AS MATTERS OF LAW, BUT SHOULD HAVE GONE TO A JURY.

The right under the Seventh Amendment to trial by jury of all factual issues in cases at law in which more than twenty dollars in damages is sought should have gotten these cases to juries, but the court below prevented that by deciding for itself disputed issues of fact, to wit, whether or not there was an opportunity for deliberation, whether there was deliberation in fact, and whether the subject conduct shocked the conscience, or, as the Tenth Circuit put it, *see Radecki, supra,* was calculatedly indifferent to petitioners' constitutional rights. Because there was an opportunity to deliberate, there was deliberation in fact, the conduct is shocking to the conscience, and the conduct was calculatedly indifferent, petitioners were deprived of their rights to trial by jury.

In *Lewis,* this Court held that "concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." 118 S.Ct. at 1718-19. Here, there was no analysis, but just a legal gloss on the facts, recited in *Onossian* in a published disposition which rejected "a narrow interpretation . . . of *Lewis*[ ] [in which petitioners] contended that the duty of police toward innocent people is greater than to fleeing suspects, so that another driver or an innocent bystander should be able to recover from the

police upon a lesser showing of recklessness or misconduct than that required by *Lewis*' 'shock-the-conscience' test." *Onossian*, 175 F.3d at 1171. Ironically, the Ninth Circuit Court of Appeals rejected petitioners' suggestion that it read narrowly this Court's *Lewis* disposition. The Ninth Circuit decided the quintessentially factual issue of whether respondents' actions shocked the conscience. Of significance in *Onossian* is the Ninth Circuit's conclusion that "[e]specially convincing is the fact that Reed was endangering the public even *before* the chase began. It is possible, perhaps even likely, that Reed would have collided with the Onossians or someone else, whether or not the police had been chasing him." *Id.* at 1171.

Then, in *Torres*, whose facts arguably are more favorable to petitioner Torres than are the facts in *Onossian* to the Onossians, in an unpublished memorandum disposition, and in complete disregard of the *"especially convincing"* opposite facts in *Torres*, that the suspect *was not endangering the public before the chase began* and that it was possible (because anything is possible) but *not likely that the suspect would have collided with Torres or anyone else, if the police had not been chasing him*, the same panel of judges disregarded its published *Onossian* disposition, made two days earlier by the same panel, and with both dispositions having been written by Judge William A. Fletcher (the docket sheet in the *Onossian* case lists Judge Fletcher as the author of the memorandum disposition in *Onossian*), to hold that "it is clear no reasonable trier of fact could find that defendants' actions shock the conscience[,]" *Torres*, 1999 WL 362974 * 1, focusing only on the "intention [of respondents] to remove an

intoxicated[2] driver from the freeway." This time the court found "[e]specially convincing [not the 'especially convincing' facts in *Onossian*, that in *Torres* the suspect posed no danger to the public except as a result of the chase and probably would not have collided with anyone but for the pursuit] the fact that the chase happened on an open freeway in light traffic, and that the pursued vehicle was far ahead and out of sight of defendants' patrol car at the time of the collision." *Ibid.* Had the two cases been consolidated and disposed of in one published opinion, it would have been difficult for an intelligent reader to square the dispositions of the two cases with one another, but with different dispositions, one published and one unpublished, the risk of that happening was made *de minimis*.

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[2] There was no evidence the suspect was intoxicated, but the speculation of respondents that the suspect might have been intoxicated should have persuaded the court below that, based on respondents' speculation, the suspect potentially was more dangerous, and should have permitted the court below to fashion its situational gloss that the speculated intoxication rendered respondents' mission more laudable. In any event, a jury, and not a court, should decide whether, under the circumstances of the case, respondents' speculation about intoxication cuts in favor of petitioners or respondents.

CONCLUSION

For the reasons set forth, this Court should grant the petition for certiorari,[3] or, alternatively, summarily reverse the dispositions of the court below. *See Heller.*[4]

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August 24, 1999

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[3] Petitioners Onossian expressly preserve their officer-liability, dependent claim under *Monell v. Dept. of Soc. Svcs. of the City of New York*, 436 U.S. 658 (1978). *See City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (plurality).

[4] *Ibid.*

APPENDIX

Noni **ONOSSIAN**; Cyril Onossian; Herve Onossian, Plaintiffs-Appellants,

v.

Sherman **BLOCK**; Michael Antonovich; Deane Dana; Ed Edelman; Kenneth Hahn; Gloria Molina; County of Los Angeles; Daniel Finn; Larry Yates; Bruce Thomas, & One Hundred Unknown Named Employees & or Officials of County of Los Angeles, Defendants-Appellees.

No. 97-56169

United States Court of Appeals, Ninth Circuit.

Submitted April 12, 1999.[1]

Marion R. Yagman and Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiffs-appellants.

Roger H. Granbo, Deputy County Counsel, Los Angeles, California, for the defendants-appellees.

Appeal from the United States District Court for the Central District of California; Robert M. Takasugi, District Judge, Presiding. D.C. No. CV-92-04816-RMT.

Before: D.W. NELSON, FERNANDEZ, and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

On the evening of August 17, 1991, Scott Reed passed defendant Los Angeles County Sheriff's deputies Finn

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[1] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a).

and Yates in his hardtop Oldsmobile "muscle car," moving in and out of traffic at about 60 miles per hour on busy Santa Monica Boulevard in Los Angeles. Finn and Yates followed Reed, who continued to drive erratically and recklessly. Finn, who was driving the patrol car, turned on his siren and lights, and gave chase. Rather than stopping, Reed attempted to elude Finn and Yates, maintaining speeds of up to 60 or 70 miles an hour.

Defendant deputy Thomas, who was monitoring the chase on his patrol car radio, saw Reed's Oldsmobile run a red light on Melrose Avenue. Finn and Yates had not been able to keep up with Reed, so Thomas took up the pursuit. Three or four seconds later, Reed crashed into the Onossians' vehicle. The entire pursuit lasted about a minute. The deputies' speeds in the two patrol cars never exceeded 45 miles per hour. The closest either car came to Reed's car was a distance of 100 yards.[2]

The Onossians were severely injured. They sued Finn, Yates, Thomas, and various Los Angeles County officials under 42 U.S.C. § 1983, seeking damages for violation of their Fourteenth Amendment due process rights.[3] The district court granted defendants' motion for

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[2] Reed was subsequently convicted in state court of reckless driving causing great bodily injury and sentenced to two years in prison.

[3] This case has a somewhat complicated procedural history. The original complaint, filed on August 12, 1992, also alleged violations of their Fourth Amendment rights. The district court dismissed the entire complaint on November 24, 1992, granting defendants' Federal Rule of Civil Procedure 12(b)(6) motion without leave to amend. Plaintiffs appealed to this court, which reversed the dismissal of the Fourteenth Amendment claims

summary judgment, using this court's then-standard for high speed chases set forth in *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir.1996). Before we heard the Onossians' appeal, the United States Supreme Court reversed our decision in *Lewis v. Sacramento County. County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

The Supreme Court held in *Lewis* that when injury or death results from a high-speed police chase "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Lewis*, 523 U.S. at ___, 118 S.Ct. at 1711-12. "[W]e hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Id.*, 523 U.S. at ___, 118 S.Ct. at 1720.

We must decide two questions in this case. First, does the *Lewis* test apply not only to harm caused to those pursued in a high speed chase, but also to harm caused to other drivers? In *Lewis* itself, two boys on a motorcycle were pursued by a police patrol car, and one of the boys was accidently killed. The words of the *Lewis* holding, read narrowly, apply only to suspects pursued by the

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and affirmed the dismissal of the Fourth Amendment claims. Plaintiffs amended their complaint, and the district court once again dismissed it without leave to amend under Rule 12(b)(6). This court again reversed, based on our now-reversed decision in *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir.1996). This case is before us for the third time.

police. For example, in the language quoted above, the Court referred to harm to "suspects" rather than harm to people generally. Similarly, the justification for the *Lewis* test, understood narrowly, might also apply only to suspects. That is, *Lewis* establishes a high threshold that must be overcome before someone injured in a police chase can show a due process violation. It might be contended that the duty of police toward innocent people is greater than to fleeing suspects, so that another driver or an innocent bystander should be able to recover from the police upon a lesser showing of recklessness or misconduct than that required by *Lewis'* "shock-the-conscience" test.

We find that such a narrow interpretation does not fully capture the meaning of *Lewis*. At several points in the Court's opinion, the duty of the pursuing police officer is defined generally, without specific reference to the suspect being pursued. Perhaps most telling is the Court's description of the dilemma of a police officer who must make a "split-second" decision whether to pursue a suspect: "A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders." *Id.*, 523 U.S. at ___, 118 S.Ct. at 1720 (emphasis added). As we read the Court's opinion, if a police officer is justified in giving chase, that justification insulates the officer from constitutional attack, irrespective of who might be harmed or killed as a consequence of the chase.

We have already come close to answering the question of a police officer's obligation to non-suspects in a high speed chase. In *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365 (9th Cir.1998), we held that the *Lewis* test applied where a bystander was killed by police in a gunfight outside a bar:

> The question we face today is whether this newly minted explanation of the 'shocks the conscience' standard also controls in cases where it is alleged that an officer inadvertently harmed a bystander while responding to a situation in which the officer was required to act quickly to prevent an individual from threatening the lives of others. We conclude that it does.

159 F.3d at 372. It is a small step from applying *Lewis* to a bystander harmed in a gunfight to applying it to another driver harmed in the very situation in which the *Lewis* test originated. We therefore hold that for the Onossians to show that their due process rights have been violated, they must show that the behavior of the police in this case "shocks the conscience."

Second, does the conduct in this case "shock the conscience" within the meaning of *Lewis*? A comparison of the chases in this case and in *Lewis* compels the conclusion that the Onossians' due process rights were not violated. Plaintiffs in *Lewis* were the parents of a boy who was killed in a high-speed police chase. Their minor son had been a passenger on a motorcycle driven by another minor. A Sacramento County Sheriff's deputy pursued the boys at high speed after they failed to stop when asked to do so by another officer. The chase, which lasted a little over a minute, reached speeds of up to 100 miles

an hour on residential streets. The motorcycle ran several stop lights and made various dangerous turns. The deputy followed closely, sometimes at a distance of as little as 100-150 feet. The chase ended when the motorcycle skidded to a halt over the crest of a hill. The deputy came over the hill, saw the stopped motorcycle, and skidded 147 feet before hitting the boy at a speed of approximately 40 miles per hour. He was thrown 70 feet down the road and was pronounced dead at the scene. The Supreme Court held in *Lewis* that the deputy's behavior did not "shock the conscience." *Lewis*, 523 U.S. at ___, 118 S.Ct. at 1721.

Comparing the facts in this case to those in *Lewis*, it is clear that no reasonable trier of fact could find that defendants' actions shock the conscience. There is no evidence that deputies Finn, Yates, and Thomas intended to cause harm to anyone. Indeed, their actions support precisely the opposite conclusion, for they were attempting to remove a dangerous driver from the streets. Especially convincing is the fact that Reed was endangering the public even before the chase began. It is possible, perhaps even likely, that Reed would have collided with the Onossians or someone else, whether or not the police had been chasing him.

Appellees request attorneys' fees under 42 U.S.C. § 1988, contending that the Onossians' appeal is frivolous, but they have failed to file a separate motion. Because a mere statement in the brief that the party seeks sanctions is not sufficient, we do not consider appellees' request for sanctions and fees. Fed. R.App. P. 38.

The decision of the district court is AFFIRMED.

Gabriel **TORRES**, Plaintiff-Appellee.
v.
H. **BONILLA** and S.M. Shenian,
Defendants-Appellants.

No. 97-55893.
D.C. No. CV-94-06667-RMT.

United States Court of Appeals, Ninth Circuit.

Submitted April 12, 1999.[1]
Decided May 28, 1999.

Appeal from the United States District Court for the Central District of California, Robert M. Takasugi, District Judge, Presiding.

Before D.W. NELSON, FERNANDEZ, and W. FLETCHER, Circuit Judges.

MEMORANDUM[2]

The facts of this case are known to the parties and we will not repeat them here except as needed.

Plaintiff Torres was severely injured when a vehicle pursued by defendants California Highway Patrol Officers collided with his car on a Los Angeles freeway. He sued defendants under 42 U.S.C. § 1983. Defendants moved under Fed.R.Civ.P. 56(b) for summary judgment on grounds of qualified immunity. The district court denied the motion, finding that there were genuine issues

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[1] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a). (2).

[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

of material fact with respect to whether defendants were entitled to qualified immunity under the standard laid down in *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir.1996). Defendants appealed to this court. District court proceedings were stayed pending the outcome of *County of Sacramento v. Lewis (Lewis)*, 523 U.S. 833, 118 S.Ct. 1708 (1998), which reversed the decision upon which the district court relied and which now governs the determination of qualified immunity. *Id.* at 1721.

The denial of qualified immunity, to the extent it turns on issues of law, is immediately appealable. *Behrens v. Pelletier*, 516 U.S. 299, 306, 311 (1996). The denial of summary judgment is also appealable when it concerns an abstract issue of law relating to qualified immunity. *Id.* at 313, citing *Johnson v. Jones*, 515 U.S. 304 (1994). "Thus, we have jurisdiction over an interlocutory appeal from the denial of qualified immunity where the appeal focuses on whether the defendants violated a clearly established law given the undisputed facts. . . . " *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir.1997). We review the denial of qualified immunity de novo. *Carnell v. Grimm*, 74 F.3d 977, 978 (9th Cir.1996). The only question before us is whether, viewing the facts in the light most favorable to plaintiff, defendants violated a clearly established law. *See Thomas v. Gomez*, 143 F.3d 1246, 1248 (9th Cir.1998).

At issue is whether the defendants deprived Torres of his due process rights under *Lewis*, 523 U.S. at ___, 118

S.Ct. at 1716-21.[3] To show such a deprivation, Torres must show that the police conduct at issue here was "shocking to the conscience." *Id.*, 523 U.S. at ___, 118 S.Ct. at 1711-12; accord *Onossian v. Block*, No. 97-56169, ___ F.3d ___ (9th Cir. Apr. 12, 1999).

Comparing the facts in this case to those in *Lewis*, it is clear that no reasonable trier of fact could find that defendants' actions shock the conscience. There is no evidence that the defendant officers intended to cause harm to anyone. Rather, their intention was to remove an intoxicated driver from the freeway. Especially convincing is the fact that the chase happened on an open freeway in light traffic, and that the pursued vehicle was far ahead and out of sight of the defendants' patrol car at the time of the collision.

The district court's denial of summary judgment is REVERSED. We REMAND, and direct the district court to enter summary judgment in favor of defendants.

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[3] The issue of qualified immunity need not be addressed until the Court ascertains that the plaintiff has alleged a deprivation of a constitutional right. *Lewis*, 523 U.S. at ___, 118 S.Ct. at 1714, n. 5.